IN THE HIGH COURT OFJUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 765 OF 2001

Pandurang Raghunath Shinde... Appellant

vs

The State of Maharashtra ... Respondent

Mr.Nitin Sejpal for Appellant

Ms.G.P.Mulekar, A.P.P. for Respondent

CORAM : D.G.DESHPANDE AND
SMT ROSHAN .S.DALVI, JJ
DATE: 9th January, 2007

JUDGMENT (Per Smt. R.S.Dalvi, J)

1. Upon the prosecution case of murder of the victim Raju Naidu on 3rd November, 1999 at 10 p.m. in Panchsheel Nagar, Mulund Mumbai by the accused in the course of quarrel by piercing a weapon like hack-saw blade in the arm pit of the victim which proved to be fatal, the accused has been convicted of the offence for murder and sentenced to suffer imprisonment for life under section 302 IPC.

2. It is the case of the appellant/accused that he had no intention to commit the murder of the deceased, had no enmity with the deceased and that in a scuffle the deceased who was drunk, first assaulted the appellant by giving him a fist blow and the appellant inflicted a single blow upon the deceased on the 6th intercostal space without undue force and has not attempted to repeat the blow. Further contention on his behalf is that the alleged instrument is merely a hack-saw blade. A very strong endeavor has been made by the learned Advocate for the accused that the offence is not proved by various eye witnesses who have been examined and that three of the eye witnesses have turned hostile and another eye witness is only a child eye witness whose evidence must be taken with extreme caution. He argued that her evidence is such which is to be entirely discarded because of major contradictions/omission and the fact that her statement was recorded 3 or 4 days after the incident.

3. The prosecution case rests upon the FIR filed by the complainant examined as PW 1 and the eye witness account of PWs,1,2,3 and 5. PWs 1,2 and 3 have turned partly or fully hostile. PW 5 is the child witness. This eye witness account of the child witness is sought to be corroborated by the injuries suffered by the deceased victim as shown in the post mortem report Exhibit 13 deposed by PW 4 the doctor who prepared the report. The C.A.'s report shows that the blood stained clothes of the deceased as well as knife, had blood of group A which is the blood group of the accused.

4. The evidence of the eye witnesses is, therefore, required to be considered. PW 1 has deposed about the fact that he saw the deceased at 10 p.m on 3rd January, 1999 near his house as well as the fact that the accused came there. He has deposed about the fact that the accused asked the victim what he had spoken about his mother and the victim

slapped the accused. Thereafter, his entire evidence aside from this fact cannot be considered in view of a material omission in the FIR and the fact that he turned hostile and refused to depose about the use of any weapon by the accused.

5. PW 2 has again deposed that he saw the deceased and the complainant sitting on the otla and chit chatting at 10 p.m. on 3rd November, 1999. He has deposed that a scuffle was going on between the deceased and the accused. However, he has turned hostile and deposed that he heard a hue and cry because of which he came to the place of the incident and saw the deceased lying on the ground. The complainant was rescuing the deceased from the quarrel. Nevertheless his deposition shows that the scuffle was going on. It also shows that the complainant lifted the deceased along with other persons and took him to the hospital and the deceased had bleeding injuries and the accused ran away. His

deposition further shows that the daughter of the deceased was also present at that time. He has further deposed that he does not know how the deceased sustained injuries and was therefore, declared hostile. In his cross examination, he has wavered that he saw the accused stabbing the deceased with a weapon and due to that stab injury the deceased fell onto the ground and further deposed as true the fact that the deceased was lying on the ground when he reached the place of the incident denoting that he had not seen the place of the incident at all. In the further cross-examination, he has disputed the fact that he was not present at the time of the incident and refuted the fact that he had not seen the accused assaulting the deceased.

6. Reading the whole of his evidence does not show him to be a hostile witness. He was declared hostile upon deposing that he does not know who stabbed the deceased which fact he has mentioned in

his cross examination. The evidence is required to be read as a whole. Admissions in the cross-examination are equally vital.

7. Nevertheless, the evidence of PW 2 does not inspire complete confidence with regard to the stabbing act of the accused and the injuries suffered by the deceased. However, his evidence shows the fact of his presence, fact of the presence of the daughter of the deceased as well as other people at the time of the incident. It shows a scuffle between the accused and the deceased and the fact that the deceased who was injured was removed to the hospital and later succumbed.

8. PW 3 another eye witness has deposed the presence of persons in front of the house of the deceased when he saw the accused also present. He has not mentioned about the role of the accused and accordingly his evidence is worthless.

9. From the aforesaid three eye witnesses accounts, the presence of the accused and the deceased, the scuffle between them, the fact of the injured being removed to hospital and the ultimate death are unmistakenly shown. PW 1 is the complainant. He has lodged the FIR. His FIR shows the entire incident. It shows inter alia the fact that the daughter of the deceased was present near the place where the deceased and the accused were initially drunking and later where they had a scuffle.

10. In this light the evidence of PW 5, the child witness, who is the daughter of the deceased has to be examined. On 3rd November, 1999 she was at her residence. Her father was sleeping. The complainant took her father outside the house. Her father, the complainant and the accused were drinking liquor on the otla in front of their house. The complainant asked her to keep the glasses inside. The accused gave a blow by a knife on the left side of upper part of chest

below his arm pit. His father fell on the ground. She asked the accused and the complainant what they were doing and they both replied him that their father had fallen down and they were lifting him. She has also deposed about the presence of other persons who have been deposed by other eye witnesses including PW 3.

11. Her evidence shows a major contradiction which makes an allegation against the complainant against whom the prosecution has not made any charge. Hence, that portion is required to be discarded. A reading of her evidence shows her presence at the scene of the offence. It is in two parts; prior to the incident and at the time of the incident. She was in the house with her victim father. He went out and remained out on the otla for sometime drinking liquor. She kept the glasses away. She saw the accused stabbing her father. She has described the stab blow.

12. It is argued before us that her evidence shows her conservation with the deceased and the accused. That is about the question put by her as to what they were talking and their reply that the deceased fell down on the ground and they were lifting him. This portion of the evidence has to be viewed in the language of the victim. It does not show the conversation. It merely shows an anxious cry upon seeing the incident. Since her evidence is that the accused gave a knife blow on the chest of the deceased, which she saw, she screamed as to what he was doing. The reply does not matter. A reading of the evidence shows that the act of the accused and the screams of the daughter of the victim happened simultaneously which is only why she was screamed as to what he was doing. It does not matter that she screamed or asked anything. All that we are concerned with is the incident which transpired between the accused and the deceased which she witnessed. Her eye witness account is credible. She is

a natural witness. Her presence is shown in the FIR itself. Her presence is also shown in the evidence of P W 2 who has deposed about the scuffle. She, in turn, has deposed about the presence of PW 3 amongst others. There is nothing to discard the evidence because she happens to be the daughter of the deceased. In fact, because of that, her presence is seen to be natural.

13. Her statement has been recorded after 4 days. It is argued on behalf of the accused that this amounts to a fatal delay. It must be remembered that she is only a child witness. There were many other adult witnesses. Their statements were recorded. At that time it was not known that some of them would turn hostile, partly or fully. The police would naturally rely upon the adult witnesses, if available. Her statement would therefore, be recorded later. It was safe that it was recorded. At the time of trial, it was realised that others have at least partly turned hostile. Hence, her

statement has been used and her evidence has been recorded as PW 5.

14. Our attention has been drawn to the case of **Jagjit Singh alias Jagga vs State of Punjab 2005 Supreme Court Cases (Cri) 893 at page 903**. This was the case of a sole child eye witness who deposed 5 years after the incident about the murder of 3 persons. Her evidence regarding the involvement of the accused was found doubtful in the absence of anything to show that she had either seen or known him prior to the occurrence. No motive was established. How the third person was murdered was not stated. The evidence of her father was discarded. All these circumstances were viewed in the light of the fact that her statement was recorded by the Investigating officer for the first time 3 days after the occurence. Consequently, tutoring was not ruled out and it was held unsafe to convict the accused on her sole testimony. It is incorrect to rely on one solitary para in the judgment

showing delay in recording the statement at the house of the child eye witness. In that case there are several circumstances which, when viewed together, created suspicion that the accused had committed the offence as deposed by the sole eye witness.

In this case, the accused was known to PW 5. He was present at the scene of the offence. A scuffle which took place between him and the deceased. Other witnesses' statements were recorded. Her statement was recorded later. She is not the sole eye witness whose statement is recorded after undue delay.

15. Similarly in the case of **Balkrushna Swain Vs State of Orissa 1971 Supreme Court Cases (Cri) 313** it has been held :

"Much reliance cannot be placed on the evidence of a witness when for no justifiable reason he was not examined by the investigating officer for a number of days particularly when the witness is found to be

telling falsehood on material aspects of the case and tries to conform to the evidence of other witnesses. “

In this case, there were three other eye witnesses examined soon after the incident. That itself justified the non-examination of PW 5 as she was a child witness. Her evidence is found to be satisfactory. She has not stated the falsehood on material aspects of the case. The reasoning in the judgment in the case of Balkrushna Swain supra cannot apply to this case.

16. Further in the case of **Baban Bakayya Attre vs State of Maharashtra 2001 (4) Mh.L.J.404** it has been held that corroboration of evidence of a child eye witness is required as a rule of prudence.

In this case, her evidence is corroborated entirely by the medical report that the rule of prudence is complied.

17. The evidence of PW 5 shows in the most

natural course what an inmate of the house where a scuffle took place is expected to see.

18. Her evidence is corroborated by the evidence of PW 4 the doctor who prepared the post mortem report. The doctor found a knife/blade inside the chest of the deceased. He, therefore handed it over to the Investigating Officer. It came to be recovered from the doctor. The doctor identified it in Court. The doctor deposed that the injuries could be caused and were caused by such a knife which penetrated in the hear of the deceased through and through and cut his left lung. The doctor has detailed the injuries of the deceased. He has had abrasions/contusions inter alia near his thyroid, in his chest, chin and right cheek. Internal injuries detailed by the doctor are that 6 ribs were cut, plura was torn. The plural cavity was filled with 1.5 litres of blood and correspondingly the heart chambers were empty with clotted blood at the edge. The cause of death as given by the doctor was haemorrhagic shock due to stab injury piercing the

lung and heart chamber.

19. The evidence of a child is completely corroborated by the medical evidence. The presence of the child is corroborated by the FIR and evidence by PW 2.

20. The evidence shows that the accused had come with a knife/hackshaw blade and entered upon a quarrel. It does not show that the accused in a heat of moment picked up a weapon found nearby and assaulted the deceased which resulted in death.

Our attention has been drawn to the case of **Appana Yellawwa Madar vs State AIR 1956 BOMBAY** 471 in which it is held that where there are improvements in the evidence which makes the evidence not wholly satisfactory, it is a fatal infirmity in which case the subsidiary facts like the discovery of the axe cannot cure the infirmity. As aforesaid, there

is only one improvement in the evidence of PW 5. That must be and is discarded.

21. In the case of **State of Tamil Nadu vs K.Karuppuswamy 1993 Supp. 1 Supreme Court Cases 78** the appreciation of evidence of a child witness has been considered. That was also the case where a child witness had seen the gruesome murder of her father. It was observed that one could not brush aside the agitated mood and mind at that time. She must have got the rudest shock of her life. She was therefore, expected not to give complete details of the incident showing the names of the persons whom the deceased chased or the details of whether the deceased caught hold of the hair of the accused etc. It was further held that she, being a child witness, no motive by her against the accused could be imputed against her and accordingly, despite a couple of mistakes in the actual identification of the accused and as who chased them, her evidence was accepted and it was

observed that such mistakes were bound to occur. In fact, it was further observed that only a tutored witness can depose in a parrot-like fashion and a natural witness was bound to commit mistakes. Consequently, the reasoning adopted by the High Court in finding the mistakes in her deposition so as to reject it leading to acquittal of the accused was set aside and the trial judge's judgment of conviction was restored.

22. The description of the incident is clearly and specifically made in her evidence. That is fully satisfactory. There is no reason to discard the description of the incident between the accused and the deceased merely because of an improvement which relate to the complainant. Even the contention on behalf of the accused that there was a single stab injury is incorrect as seen from the evidence of Dr. PW 4. and the post mortem report; there are other minor injuries.

23. However, we may concede that because the main stab injury is only one made by a knife stated by the doctor to be 9.5 cm long and 2 cms broad, the accused did not have intention to kill the deceased and the knowledge that it would kill him. In these circumstances, we may concede that the act of the accused done upon the scuffle without the intention to cause death would fall within exception 4 to section 300 as having been committed without premeditation in a sudden fight upon a sudden quarrel and the accused not having taken undue advantage or acted in cruel or unusual manner. The conviction of the accused must, therefore be not under section 302 IPC but, has to be under section 304 Part (ii) IPC.

23. Consequently, the judgment of the learned trial Judge is set aside. His conviction under section 302 of the IPC is set aside. However, he is convicted under section 304 part II of IPC and is sentenced to R.I. For 10 years and fine of Rs.10,000/- in default for

1 year.

(Smt Roshan Dalvi, J) **(D.G.Deshpande,J)**